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No. 91-1671

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**In The
Supreme Court of the United States
October Term, 1992**

WILLIAM J. MERTENS, ALEX W. BANDROWSKI,
JAMES A. CLARKE, and RUSSELL FRANZ,

Petitioners,

v.

HEWITT ASSOCIATES, an Illinois Partnership,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Whether § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a) (1988 & Supp. II 1990), authorizes employee benefit plan participants to maintain a civil action for money damages – as opposed to equitable relief – against a non-fiduciary who provides actuarial services to an employee benefit plan, when it is alleged that the provider participated knowingly in a fiduciary breach under ERISA.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of ERISA, ERISA Regulations and the Internal Revenue Code are reproduced in the Appendix to this Brief (1A-10A).

STATEMENT OF THE CASE

Respondent, Hewitt Associates ("Hewitt"), respectfully submits that the Ninth Circuit's decision, holding that ERISA employee benefit plan participants cannot maintain a civil action for money damages against a non-fiduciary provider of actuarial services who allegedly participated knowingly in a fiduciary breach under ERISA, should be affirmed. (Joint Appendix ("J.A.") 35-49.)

BACKGROUND

This action is the third in a series of cases filed by former salaried employees of Kaiser Steel Corporation ("Kaiser") seeking to recover benefits lost when the Pension Benefit Guaranty Corporation ("PBGC") terminated the Kaiser Steel Retirement Plan ("Plan") in February 1987, immediately following Kaiser's bankruptcy.

In the first case, former Kaiser employees unsuccessfully sued certain Plan fiduciaries alleging that their failure to purchase pension funding annuities constituted an abuse of discretion and a breach of their fiduciary duties under ERISA. *Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412 (9th Cir. 1991).

A second class action currently pending in the District Court (filed in 1988 by the same former Kaiser employees who are the Petitioners here) claims that the Plan fiduciaries breached their fiduciary duties by failing to ensure the Plan's adequate funding. *Mertens v. Black*, No. CV 88-3587-MHP (N.D. Cal. 1989).

On December 18, 1989, Petitioners filed this class action against Hewitt, an employee benefit consulting firm that performed actuarial services for Kaiser during the 1980's. (J.A.

1.) Petitioners allege that the Plan's financial woes were not caused by Kaiser's demise or the actions of the Plan's fiduciaries, but rather by Hewitt's failure to comply with its "professional obligations" under ERISA. (J.A. 7.)

PETITIONERS' COMPLAINT

According to the Complaint,¹ during the early 1980's, Kaiser began to restructure its business. That restructuring ultimately resulted in the virtual elimination of its steel-making operations. (J.A. 4-5.) The number of Kaiser employees entitled to full early retirement benefits under the Plan allegedly increased significantly, as did the Plan's funding costs. (J.A. 5.)

Petitioners contend that the actuarial assumptions Hewitt had previously developed for the Plan did not reflect the cost increases and that Hewitt did not change its assumptions to reflect those increases. (*Id.*) As a result of Hewitt's alleged improper conduct, Kaiser purportedly failed to fund the Plan adequately and the Plan's assets thus became insufficient to satisfy its benefit commitments. (J.A. 6.)

In February, 1987, the PBGC determined that the Plan was underfunded and incapable of paying its liabilities. (J.A. 37 n.1.) Accordingly, the PBGC terminated the Plan and began paying Petitioners and other participants reduced benefits. (J.A. 6.)

Petitioners' asserted three causes of action against Hewitt: (1) a "breach of professional duties" claim under ERISA (J.A. 9-13); (2) a "prohibited transaction" claim under ERISA (J.A. 13-14); and (3) a professional negligence claim under California law. (J.A. 15-17.)

¹ The District Court granted Hewitt's Fed. R. Civ. P. 12(b)(6) motion and the Ninth Circuit affirmed that dismissal on the claim before this Court. (J.A. 19-33; 35-49.) For purposes of that motion only, the allegations of the Complaint were accepted as true. Hewitt denies all material allegations of Petitioners' Complaint and maintains that at all times it complied with ERISA and all generally accepted actuarial principles and standards in performing its work on the Plan.

The Complaint did *not* assert that Hewitt participated in a fiduciary breach, nor, for that matter, did it allege that a fiduciary duty had been breached by anyone.

HEWITT'S MOTION TO DISMISS

On March 7, 1990, Hewitt moved to dismiss the Complaint on the grounds that it was barred by the applicable statutes of limitations and that the ERISA counts failed to state claims upon which relief could be granted. (*See* J.A. 1.) In response to Hewitt's motion, Petitioners argued, for the first time, that their initial claim (breach of professional duties) should be construed to support any of three different causes of action: (1) breach of fiduciary duty under ERISA; (2) knowing participation in a breach of fiduciary duty under ERISA; or (3) breach of professional actuarial duties under ERISA. (J.A. 22, 25-26.) Petitioners stood by their remaining claims as pled.

THE DISTRICT COURT'S DECISION

The District Court construed the Complaint in the light most favorable to Petitioners, including construing it, over Hewitt's objections, to include claims for breach of fiduciary duty and knowing participation in an ERISA fiduciary breach. The court then determined that the ERISA claims were insufficient as a matter of law and that the applicable California two year limitations period barred the pendent professional negligence claim. (J.A. 19-34.)

Specifically, the District Court held that Petitioners could not state a claim against Hewitt for breach of fiduciary duty because the Complaint merely alleged that Hewitt improperly performed its actuarial duties. Those duties did not involve exercising sufficient authority over the Plan's assets to render Hewitt an ERISA fiduciary. (J.A. 22-25.)

The District Court also held that, as a matter of law, Petitioners could not state a claim for money damages under ERISA against a non-fiduciary for knowing participation in a fiduciary breach, citing the Ninth Circuit's previous rulings in

Nieto v. Ecker, 845 F.2d 868, 873 (9th Cir. 1988), and *Call v. Sumitomo Bank*, 881 F.2d 626, 634 (9th Cir. 1989). (J.A. 25.)

Nor could Petitioners state a claim for breach of professional duties under ERISA. (J.A. 26-28.) The District Court recognized that the only avenue for redress of ERISA violations committed by a non-fiduciary is through a claim for equitable relief under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (1988). At Petitioners' request, the District Court construed Petitioners' prayer for relief – which sought an order that Hewitt “make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from [Hewitt's alleged] breaches of ERISA,” together with a claim for punitive damages (J.A. 15) – as a prayer for restitution. (J.A. 26.)

While acknowledging that restitution could be awarded under § 502(a)(3) in appropriate circumstances, the Court found such relief unavailable here because Petitioners had not alleged that Hewitt's purported violations resulted in any benefit to it beyond normal compensation.² (J.A. 28.)

The court further held that Hewitt's acceptance of reasonable compensation could not subject it to a “prohibited transaction” claim. (J.A. 29-30.) More fundamentally, the court found that the prohibited transaction claim failed because such a claim requires wrongful receipt of plan assets. (J.A. 30.) *See also* ERISA § 406, 29 U.S.C. § 1106 (1988). Since the Complaint alleged that Kaiser, not the Plan, paid Hewitt for its services, the District Court found that no

² The District Court also noted that ERISA provided redress against actuaries who violate ERISA in the form of injunctive and disciplinary relief:

That is not to say that no protections are available against actuaries who violate ERISA without profiting from their malfeasance. Timely injunctive relief is available under §§ 502(a)(3) and (a)(5). Moreover, relief is also available through the Joint Board for Enrollment of Actuaries who may suspend or terminate an offending actuary's right to provide services to ERISA plans. (J.A. 28.)

prohibited transaction had occurred between Hewitt and the Plan. (J.A. 30.)³

Petitioners did not seek leave to amend their Complaint and an appeal to the Ninth Circuit followed. Petitioners *only* appealed from the dismissal of their (implied) breach of fiduciary duty and knowing participation claims and from their (explicitly pled) breach of ERISA professional duties and pendent professional negligence claims. Petitioners did not seek review of the dismissal of their prohibited transaction claim. (J.A. 38 n.2.)

THE NINTH CIRCUIT'S DECISION

The Ninth Circuit affirmed the dismissal of each of Petitioners' ERISA claims. (J.A. 35-46.) It found that Petitioners' “knowing participation” money damages claim⁴ was not cognizable under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) (1988). (J.A. 41-44.) Like the District Court, the Ninth Circuit held that ERISA § 502(a)(3) permits plan participants to seek “appropriate equitable relief” from non-fiduciaries to redress ERISA violations. (J.A. 44.) The Ninth Circuit further ruled that Petitioners could possibly obtain monetary relief under an equitable restitution theory, but agreed with the District Court that Petitioners had failed to state a viable restitution claim as a matter of law. (J.A. 44-45.)

While acknowledging the possibility that non-fiduciary service providers to ERISA plans could be liable as ERISA fiduciaries if they exercised discretionary authority over a plan, the Ninth Circuit found that Hewitt was not an ERISA fiduciary. (J.A. 39-41.) Petitioners' Complaint reflected that

³ The District Court also held that California's two year statute of limitations barred Petitioners' pendent professional negligence claim. (J.A. 30-31.)

⁴ Although Hewitt argued the issue, the Ninth Circuit never addressed the fact that Petitioners' Complaint failed to allege a fiduciary breach by anyone or that Hewitt knowingly participated in any such breach.

Hewitt had not done anything other than render actuarial services to the Plan. Since a party "rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan 'in a manner other than by usual professional functions'" (J.A. 39) (citations omitted), the Ninth Circuit held that Petitioners could not state a breach of fiduciary duty claim against Hewitt (J.A. 41).⁵

THE PETITION FOR WRIT OF CERTIORARI

On April 14, 1992, Petitioners filed their Petition for Writ of Certiorari, seeking review only of the Ninth Circuit's holding that ERISA does not provide them with a cause of action for money damages against Hewitt despite Hewitt's purported knowing participation in a fiduciary breach. On October 5, 1992, this Court granted the Petition.

SUMMARY OF ARGUMENT

I.

The disagreement among Petitioners, the Solicitor General and Hewitt is narrow. All agree that, if plan participants can maintain an ERISA civil action for monetary relief against non-fiduciaries, such an action must be brought under the "appropriate equitable relief" provision of ERISA § 502(a)(3). (Brief for Petitioners ("Pets' Br.") at 18-19; Brief for the United States As Amicus Curiae Supporting Petitioners ("SG Br.") at 9.) Petitioners call the compensatory and punitive damages sought "monetary" or "make whole" relief to recover "losses" purportedly suffered as a result of Hewitt's improper conduct. (Pets' Br. at 10, 15, 18-19.) Whatever the label, Petitioners are seeking money damages. The

⁵ The Ninth Circuit reversed and remanded the dismissal of the pendent professional negligence claim. (J.A. 48.) On remand, Hewitt moved for summary judgment on the grounds that the professional negligence claim was preempted under ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). The District Court denied - Hewitt believes erroneously - that motion.

question thus is whether "appropriate equitable relief" encompasses money damages. Under ERISA, as under the common law, the answer to that question is no.

ERISA's civil enforcement provision, § 502(a), specifies six civil actions that may be maintained by plan participants, beneficiaries, fiduciaries or the Secretary of Labor. None of § 502(a)'s provisions authorizes plan participants to seek damages from a non-fiduciary. A plan *fiduciary* is: personally liable for any losses resulting from a fiduciary breach; required to restore any profits made through use of plan assets; and subject to other "equitable and remedial relief," including removal, in a civil action initiated pursuant to ERISA § 502(a)(2). No parallel scheme of remedies exists against a non-fiduciary. Any civil action initiated by plan participants against a non-fiduciary must be brought under ERISA § 502(a)(3), which limits participants to obtaining injunctive and "other appropriate equitable relief."

ERISA's plain language demonstrates that Congress did not intend to provide plan participants with the right to obtain damages from a non-fiduciary. Given ERISA's "comprehensive and reticulated" nature and the deliberate care with which it was enacted, the "six carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) (emphasis in original) (citation omitted). Here, the "strong" presumption that the statute's plain language expresses Congressional intent has not been rebutted.

ERISA was enacted to establish standards of conduct, responsibility and obligation for fiduciaries, and consequently, distinguishes fiduciaries from non-fiduciaries. Every employee benefit plan must provide for one or more named fiduciaries who have authority to control and manage the plan. Those named fiduciaries can delegate responsibilities among themselves or designate others to perform fiduciary functions. Apart from those named or designated as fiduciaries, a person may be deemed an ERISA fiduciary if the person exercises discretionary authority or control over a

plan. By breaking down fiduciary functions and adopting this broad discretion-centered functional definition, Congress ensured plan participants that they would always have a fiduciary to hold personally accountable for losses sustained should there be a breach of duty. However, Congress specifically chose not to subject actuaries, accountants, lawyers and other professional service providers to ERISA's fiduciary standards and attendant personal liabilities unless those service providers do more than perform their statutorily mandated functions and, in fact, exercise true discretionary control over a plan.

Petitioners seek to impose fiduciary damage liability on Hewitt even though Hewitt is not an ERISA fiduciary, since it did not exercise any discretionary control over the Plan or its assets. If their effort is successful, the careful distinction Congress drew between fiduciaries and non-fiduciaries when it enacted ERISA will be erased.

Although non-fiduciaries are not subject to ERISA fiduciary damage liability, plan participants have recourse against non-fiduciaries who engage in improper conduct. A non-fiduciary who engages in a prohibited transaction is subject to a civil action to "correct" the transaction and prevent unjust enrichment. The non-fiduciary is also subject to punitive taxation and fines for having engaged in the prohibited transaction. If the violation does not involve a prohibited transaction, appropriate equitable relief, such as injunctive or restitutionary relief, is available against a non-fiduciary. Finally, actuaries are subject to a specific ERISA regulatory and disciplinary scheme which has no provision for damages.

ERISA's legislative history is replete with evidence that Congress, knowing the contribution actuaries would make to ERISA plans, nevertheless chose not to make actuaries subject to ERISA fiduciary damage liability. While requiring the Secretaries of Labor and Treasury to establish rules and regulations for actuaries, Congress decided not to dictate specific actuarial assumptions and methods because of its unwillingness to "straitjacket" ERISA actuaries. Congress recognized that the choice of appropriate actuarial assumptions should remain a matter of professional judgment.

Instead of subjecting actuaries and other non-fiduciary service providers to ERISA fiduciary damage liability suits, Congress struck a careful balance between its desire to protect plan participants and its reluctance to unduly increase pension costs.

Congress' intentional omission of a participant's right to maintain a civil action seeking to impose damage liability on non-fiduciaries for their knowing participation in a fiduciary breach is further demonstrated by Congress' recent rejection of a proposed ERISA amendment that would have imposed precisely such liability on non-fiduciaries. This Court should not find that such a cause of action exists when Congress specifically refused to create one.

II.

Petitioners and the Solicitor General contend that since equity courts traditionally awarded damages for breaches of trust, the compensatory and punitive damages sought here are "appropriate equitable relief." (Pets' Br. at 24 n.5; SG Br. at 10-18.) In making that argument, Petitioners and the Solicitor General confuse equitable "relief" and equitable "jurisdiction." Because equity courts had exclusive jurisdiction over trust cases at common law, they could award both equitable and legal relief. However, common law damages are not transformed from a legal remedy into an equitable one merely because courts of equity award them. This Court's prior rulings, together with ERISA's plain language, structure and legislative history, demonstrate that when Congress used the phrase "appropriate equitable relief" in ERISA § 502(a)(3), it meant exactly what it said: plan participants can obtain only injunctive, declaratory or other appropriate equitable relief from a non-fiduciary.

The references in ERISA's legislative history to the common law of trusts do not justify the wholesale importation from the common law of a damages cause of action that is absent from ERISA's plain language, and unsupported by the history, purpose and structure of the statute.

Nor does the federal common law provide a basis for creating a cause of action that Congress deliberately chose not to enact. The federal common law is invoked only rarely, and then only in areas where Congress has not already spoken. Here, Congress "spoke" by declining to impose fiduciary damage liability on non-fiduciaries. Under these circumstances, the federal common law cannot be used to supplement the explicit and exclusive remedies set forth in ERISA § 502(a).

ERISA § 502(l), 29 U.S.C. § 1132(l) (Supp. II 1990), which permits the Secretary of Labor to assess a civil penalty against fiduciaries who breach their duties and "other persons" who participate in an ERISA fiduciary breach, is not authority for the contention that Congress intended to permit plan participants to seek money damages from non-fiduciaries. ERISA § 502(l) applies only to the Secretary of Labor. That section gives the Secretary the power to assess civil penalties. It does not authorize the Secretary, much less participants, to maintain a civil action to impose damage liability on a non-fiduciary who knowingly participates in a fiduciary breach. The legislative history of § 502(l) confirms that Congress never intended to provide participants with such a cause of action.

Russell's pronouncement that courts should not engraft causes of action Congress chose not to incorporate into ERISA's remedial scheme remains controlling, and this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990), is not to the contrary. To reverse the Ninth Circuit, this Court would have to ignore its admonition in *Russell*.

Finally, Petitioners have abandoned any claim for equitable relief in this case. In affirming the dismissal of Petitioners' ERISA claims, the Ninth Circuit found that Petitioners did not state an equitable restitution claim under § 502(a)(3) because they had not alleged that Hewitt received anything other than normal compensation for its actuarial services. (J.A. 44.) Moreover, it found that no direct link existed between the loss complained of and the recovery sought, since Hewitt was paid by Kaiser, not out of Plan

assets. (J.A. 45.) Petitioners did not seek review of that portion of the Ninth Circuit's decision in this Court.

ARGUMENT

I. ERISA DOES NOT PERMIT PLAN PARTICIPANTS TO MAINTAIN A CIVIL ACTION SEEKING MONEY DAMAGES FROM NON-FIDUCIARIES.

A. ERISA'S PLAIN LANGUAGE DOES NOT ALLOW RECOVERY OF DAMAGES FROM NON-FIDUCIARIES.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Petitioners concede that ERISA's explicit language does not permit plan participants to bring a suit for damages against a non-fiduciary service provider who allegedly participates knowingly in a fiduciary breach. (See Petition for Writ of Certiorari ("Cert. Pet.") at 9.) Nevertheless, Petitioners contend that Congress had an "original intent to impose [such] liability on aiders and abettors of fiduciary breaches." (Pets' Br. at 9.)⁶

Given their admission, Petitioners' task is an extraordinarily difficult one. "Absent a clearly expressed legislative intention to the contrary, [a statute's] language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n*, 447 U.S. at 108 (emphasis added). "The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'" *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991) (emphasis added) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Where the statutory text is clear, the burden

⁶ In their Brief, Petitioners characterize the relief they seek as "monetary" or "make whole" relief (Pets' Br. at 10, 15, 19), or as an attempt to recover "losses" allegedly suffered (Pets' Br. at 18). Because Petitioners' Complaint seeks, *inter alia*, punitive damages and recovery by the plaintiff class of "all losses" resulting from Hewitt's alleged ERISA breach (J.A. 15), Petitioners are, in fact, plainly seeking "money damages."

on a party proposing a statutory interpretation at odds with the text is "exceptionally heavy." *Union Bank v. Wolas*, 112 S. Ct. 527, 530 (1991) (emphasis added).⁷

ERISA § 502(a) is the civil enforcement provision of the statute. It specifies six civil actions that may be maintained by plan participants, beneficiaries, fiduciaries or the Secretary of Labor. These "six carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Russell*, 473 U.S. at 146 (emphasis in original). None of § 502(a)'s provisions authorizes a plan participant to maintain an action seeking damages, as opposed to equitable relief, from non-fiduciaries.⁸ "The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'" *Id.* (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)).

Because of ERISA's comprehensive and reticulated nature, and because of the "deliberate care" with which it was drafted, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987), this Court's ERISA decisions demonstrate a special

⁷ See also *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992) ("when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) ("we have considered ourselves bound to 'assume that the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984))).

⁸ The relevant portions of ERISA § 502(a) provide that "a civil action may be brought . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109 (1988)]; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

concern with effectuating the plain meaning of the words chosen by Congress.

Most recently, in *District of Columbia v. Greater Washington Bd. of Trade*, No. 91-1326, 1992 WL 362797, at *3 (U.S. Dec. 14, 1992), for example, this Court relied on the plain meaning of ERISA § 514(a) in holding that ERISA preempted a District of Columbia statute which required employers who provide health insurance for their employees to furnish equivalent coverage to injured employees eligible for workers' compensation benefits. Last term, in *Patterson v. Shumate*, 112 S. Ct. 2242, 2247-48 (1992), this Court relied on the plain language of ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988), in holding that an anti-alienation provision in a plan which accorded with § 206(d)(1) satisfied the "literal terms" of the exclusion of property from bankrupt estates in § 541(c)(2) of the Bankruptcy Code. And in *PBGC v. LTV Corp.*, 496 U.S. 633, 645 (1990), this Court upheld the PBGC's decision to restore LTV's terminated pension plans based on the "plain language of [ERISA] § 4047 [29 U.S.C. § 1347 (Supp. II 1990)]" despite the contention that that decision defeated the "policies and goals" of federal bankruptcy and labor law.

ERISA's "plain language" likewise should control this case.

B. ERISA'S STRUCTURE CAREFULLY DISTINGUISHES FIDUCIARIES FROM NON-FIDUCIARIES.

ERISA establishes "standards of conduct, responsibility and obligation for *fiduciaries* of employee benefit plans. . . ." ERISA § 2(b), 29 U.S.C. § 1001(b) (1988) (emphasis added). An employee benefit plan must "provide for one or more named fiduciaries who . . . shall have authority to control and manage the operation and administration of the plan." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1) (1988). Those named fiduciaries can allocate fiduciary responsibility among themselves, and are permitted to designate other persons to carry out fiduciary obligations. ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (1988).

Apart from those named or designated, a person will be deemed an ERISA fiduciary to the extent he exercises discretionary authority, responsibility, or control respecting the management or administration of a plan. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988). This "seemingly complex definition of 'fiduciary' . . . carefully directs attention away from the title and *toward the function*. . . . The definition is discretion-centered." John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 496-97 (1990) (emphasis added). Congress thus broadly imposed fiduciary status on those persons who exercise discretionary authority or control over a plan or its assets. In doing so, Congress ensured that plan participants would always have a fiduciary to hold accountable for losses sustained as a result of a breach of fiduciary obligations. Because of their discretionary authority and control, fiduciaries who breach their obligations are subject to personal liability for any losses sustained, are required to disgorge any profits garnered through use of plan assets, and are subject to "other equitable or remedial relief . . . including removal. . . ." ERISA § 409(a), 29 U.S.C. § 1109(a) (1988).

However, accountants, actuaries, lawyers and other professionals who render services to an employee benefit plan are *not* fiduciaries under ERISA unless they also exercise discretionary authority or control over the management or administration of a plan or its assets. See 29 C.F.R. § 2509.75-5 (1992). Significantly, the House rejected a proposed amendment that would have made ERISA's fiduciary provisions expressly applicable to actuaries, preferring instead the discretion-centered functional approach set forth in ERISA § 3(21)(A). See *Employee Benefit Security Act of 1974: Material Explaining H.R. 12906 Together with Supplemental Views*, reprinted in 2 *Legislative History of the Employee Retirement Income Security Act of 1974* at 3293, 3309 (1976).⁹

⁹ As the Conference Committee stated:

While the ordinary functions of consultants and advisers to [plans] may not be considered as fiduciary functions, it must

Since Petitioners' Complaint only reflected that Hewitt performed actuarial services for the Plan and contained no allegations indicating that Hewitt exercised any discretionary authority or control over the Plan, the Ninth Circuit found that Hewitt was not an ERISA fiduciary. (J.A. 39-41.) Nevertheless, through their "knowing participation claim," Petitioners are seeking to subject Hewitt to the same money damage fiduciary liability set forth in ERISA § 409(a). By doing so, they seek to erase the careful distinction Congress crafted between fiduciaries and non-fiduciaries. Under their scheme, it would make no difference whether a service provider merely performed its statutorily mandated functions, or "crossed the line" and exceeded the normal scope of authority by exercising discretionary authority over a plan. In either case, Petitioners and the Solicitor General would hold the non-fiduciary service provider subject to the same civil money damage liability as a fiduciary.

That is not what Congress intended. Under the civil enforcement scheme set forth in ERISA § 502(a), Congress elected to permit plan participants to maintain civil actions seeking the recovery of money damages against fiduciaries only. However, Congress provided participants with other specific remedies and causes of action under ERISA which they can pursue against non-fiduciaries who engage in improper conduct.

A non-fiduciary who falls within the statutory "party in interest" definition (by providing services to a plan, for example) is forbidden from engaging in certain "prohibited transactions." See ERISA § 3(14)(B), 29 U.S.C. § 1002(14)(B)

be recognized that there will be situations where such consultants and advisers may because of their special expertise, in effect, *be exercising discretionary authority or control with respect to the management or administration of [a plan] or some authority or control regarding its assets*. In such cases, they are to be regarded as having assumed fiduciary obligations within the meaning of the applicable definition.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 323, reprinted in 1974 U.S.C.C.A.N. 5038, 5103 (emphasis added).

(1988); ERISA § 406. If the non-fiduciary engages in a "prohibited transaction," it is subject to a civil action seeking "correction" of the transaction to prevent unjust enrichment. I.R.C. §§ 4975(f)(5), (h), 26 U.S.C. §§ 4975(f)(5), (h) (1988). In addition, the non-fiduciary service provider is subject to punitive taxation and fines for having engaged in the prohibited transaction. ERISA § 502(i), 29 U.S.C. § 1132(i) (1988); I.R.C. § 4975, 26 U.S.C. § 4975 (1988). Moreover, even if the non-fiduciary is not a party-in-interest (and hence not subject to ERISA's prohibited transaction rules), it can be sued by plan participants under ERISA § 502(a)(3) for injunctive, declaratory, restitutionary or other appropriate equitable relief for violations of other ERISA provisions or the terms of a plan.¹⁰

In the case of non-fiduciary providers of actuarial services, Congress established an even more refined regulatory and remedial scheme. To be eligible to furnish services to an employee benefit plan, actuaries must be licensed by the Joint Board for the Enrollment of Actuaries ("JBEA"). ERISA § 3042, 29 U.S.C. § 1242 (1988). Hewitt's licensed "enrolled" actuary for the Plan was at all times under an affirmative duty to adhere to standards of performance for actuarial services promulgated by the JBEA, pursuant to its authority under ERISA § 3042.¹¹ The JBEA regulations enacted in the wake of ERISA's passage are exhaustive in scope, and impose strict

¹⁰ For example, if a non-fiduciary wrongfully obtains plan assets by theft or through other means, plan participants could maintain an action to obtain restitution of the misappropriated assets under § 502(a)(3). As this Court has recognized, "[a] fair contextual reading of [ERISA] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets. . . ." *Russell*, 473 U.S. at 142.

¹¹ Specifically, ERISA directs the JBEA to "establish reasonable standards and qualifications for persons performing actuarial services with respect to plans to which this Act applies. . . ." ERISA § 3042(a). The Act empowers the JBEA, "after notice and an opportunity for a hearing", to "suspend or terminate" the enrollment of an actuary if the actuary has, *inter alia*, "failed to discharge his duties under this Act. . . ." ERISA § 3042(b)(1).

standards of professional conduct on enrolled actuaries.¹² Moreover, they create an elaborate process for adjudicating complaints against enrolled actuaries.¹³ In addition, ERISA imposes affirmative obligations on actuaries relating to their determination of a plan's actuarial assumptions.¹⁴ Despite (or,

¹² Under the regulations, an enrolled ERISA actuary may, *inter alia*, undertake an actuarial assignment only when qualified to do so, and may not perform services for a person whom he believes may utilize his services fraudulently. 20 C.F.R. § 901.20 (1992). In addition, an enrolled actuary may not perform services when he has a conflict of interest without full disclosure to the plan's participants and beneficiaries, and he must take steps to ensure that his assumptions, calculations and recommendations are made with due care, skill, prudence and diligence. *Id.* Violations of these standards can result in the suspension or termination of the actuary's enrolled status. § 901.30.

¹³ The regulations provide for the receipt of complaints concerning an enrolled actuary by the JBEA's Executive Director (20 C.F.R. § 901.32 (1992)); institution of proceedings against an enrolled actuary by the Executive Director (§ 901.33); formal pre-litigation conferences between the Director and the accused actuary (§ 901.34); the filing of complaints and answers (§§ 901.35, 901.37); pre-hearing motions (§ 901.41); discovery depositions (§ 901.46); and hearings presided over by an administrative law judge. (§§ 901.43, 901.44, 901.45.)

Actuaries providing services to ERISA plans are also regulated by the Internal Revenue Code. See I.R.C. § 6059, 26 U.S.C. § 6059 (1988) (setting forth detailed requirements for actuarial reports that ERISA requires be filed by plans with the IRS.)

¹⁴ For example, ERISA requires that "all costs, liabilities, rates of interest, . . . be determined on the basis of actuarial assumptions and methods (A) . . . each of which is reasonable (taking into account the experience of the plan and reasonable expectations) or which, in the aggregate, result in a total contribution equivalent to that which would be determined if each such assumption and method were reasonable . . . (B) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." ERISA § 302(c)(3), 29 U.S.C. § 1082(c)(3) (1988). An enrolled actuary must prepare an actuarial statement for the plan that utilizes "such assumptions and techniques as are necessary to enable him to form an opinion" that the actuarial assumptions and methods utilized "are in the aggregate reasonably related to the experience of the

perhaps, because of) this extensive regulation of actuaries, Congress chose not to subject them to ERISA's fiduciary standards and attendant personal damage liability. This Court should not presume that Congress accidentally omitted providing a damage cause of action against actuaries from the statute.

The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.

Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 645 (1981) (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981)).¹⁵

plan and to reasonable expectations" and that the results "represent his best estimate of anticipated experience under the plan." ERISA § 103(a)(4)(B), 29 U.S.C. § 1023(a)(4)(B) (1988).

¹⁵ This fundamental limit on the scope of ERISA's remedial scheme has been recognized repeatedly. See *Nieto*, 845 F.2d at 874 (no damage claim against non-fiduciaries exists under ERISA); *Useden v. Acker*, 947 F.2d 1563, 1580 (11th Cir. 1991) (same), *petition for cert. filed*, 60 U.S.L.W. 3843 (U.S. June 1, 1992) (No. 91-1944); *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 31-33 (D. Mass. 1990) (same). Accord David L. Bacon et al., *Employee Benefits Guide* § 7.13[2], at 7-72 (1992) ("The better reasoned view is that ERISA does not permit a suit for damages against a non-fiduciary."). Cf. *Painters of Phila. Dist. Council No. 21 Welfare Fund v. Price Waterhouse*, 879 F.2d 1146, 1152 (3d Cir. 1989) (refusing to imply a private right of action against non-fiduciary under ERISA); *Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 737 (6th Cir. 1992) (rejecting private right of action for extra-contractual damages against non-fiduciary under ERISA).

Petitioners contend that six circuit courts have considered the question presented by their Petition and that four of those courts have concluded that ERISA provides a private right of action against non-fiduciaries for knowing participation in a breach of fiduciary duty. (Pets' Br. at 18, 20.) The existence of a private right of action, however, is not the issue. The issue is the availability of damages. Only a few of the decisions cited by Petitioners even reach that question. Compare *Brock v. Hendershott*, 840 F.2d 339, 341 (6th Cir. 1988) (action brought by Secretary of Labor seeking only equita-

C. THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS DID NOT INTEND TO PROVIDE PLAN PARTICIPANTS WITH THE RIGHT TO SEEK DAMAGES FROM NON-FIDUCIARIES.

ERISA's legislative history demonstrates that the statute's plain language and structure were not arrived at accidentally. That history is replete with evidence that Congress recognized the contribution actuaries would make to ERISA plans and that there was a lack of effective existing actuarial regulation.¹⁶ Congress nevertheless chose *not* to make actuaries liable for damages.

Congress decided not to dictate specific actuarial assumptions and methods precisely because of its unwillingness to "straitjacket" ERISA actuaries and plans.¹⁷ That

ble restitutionary relief) with *Thornton v. Evans*, 692 F.2d 1064, 1079-80 (7th Cir. 1982) (sustaining damages claim against non-fiduciaries on a conspiracy theory). Moreover, none of those decisions is well-considered. All ignore or minimize the plain language and structure of the statute. See, e.g., *Fink v. National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985). Finally, almost all pre-date the rejection of a proposed amendment that would have permitted damages actions against non-fiduciaries for knowing participation in a fiduciary breach. (See *infra* pp. 23-25.)

¹⁶ See, e.g., H.R. Rep. No. 807, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4670, 4758 ("[T]here is no existing government regulation of the actuarial profession. . . . To resolve this problem, the bill provides that standards and qualifications are to be established for enrolling actuaries to practice before the Internal Revenue Service. . . ."). See also S. Rep. No. 383, 93d Cong., 2d Sess. 68, reprinted in 1974 U.S.C.C.A.N. 4890, 4952; S. Rep. No. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4838, 4853.

¹⁷ As the Senate Report on ERISA stated:

Conceivably an attempt might be made to secure uniform application of the minimum funding standards by authorizing the Secretary of the Treasury or some other authority to establish the specific actuarial assumptions and methods that could be used by pension plans. This would involve, for example, setting a specific rate of interest that could be used by certain

desire stemmed from Congressional recognition that "frequently there is a range of actuarial assumptions which may be appropriate for determining the costs of a defined benefit pension plan, and the choice of the appropriate assumptions is very much a *matter of judgment*." H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4670, 4760-4761 (emphasis added).

One of ERISA's important goals is "containing pension costs." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981). Permitting damages suits against service providers would undermine that goal by raising the cost of services to plans and, ultimately, to participants.

Congress' concern with not unduly increasing the costs of private pension plans is apparent from the legislative history. *See* H.R. Rep. No. 779, 93d Cong., 2d Sess. 15, *reprinted in* 2 Legislative History of the Employee Retirement Income Security Act of 1974 at 2604 ("the committee has sought to adopt provisions which *strike a balance between providing meaningful reform and keeping costs within reasonable limits*") (emphasis added). *See also Alessi*, 451 U.S. at 516 n.12 (increased pension costs "'not the intent of this legislation which is designed to improve and encourage the expansion of private pension plans'") (quoting 120 Cong.

pension plans or by specifying certain turnover rates for specified types of firms. *However, the committee does not believe that this would be an appropriate procedure, since the proper actuarial assumptions may differ substantially between industries, among firms, geographically, and over time.* Further, in estimating plan costs each actuarial assumption may be reasonable over a significant range and it would appear that the proper test would be whether all actuarial assumptions used together are reasonable. These considerations strongly indicate that *any attempt to specify actuarial assumptions and funding methods for pension plans would in effect place these plans in a straitjacket* so far as estimating costs is concerned, and would be likely to result in cost estimates that are not reasonable.

S. Rep. No. 383, 93d Cong., 2d Sess. 23-24, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4909 (emphasis added).

Rec. 29928 (1974), *reprinted in* 3 Legislative History of the Employee Retirement Income Security Act of 1974 at 4732). While benefitting participants is also one of ERISA's primary goals, it would be inappropriate to use that as a justification for creating a cause of action that Congress intentionally omitted and for ignoring equally compelling statutory policies that counsel against such judicial invention.

The balance struck between reform and costs is reflected throughout ERISA, but most notably in § 3(21)(A) where Congress adopted a functional approach for determining whether someone is a fiduciary. By excluding service providers who do not exercise the requisite discretionary control over a plan from the fiduciary definition, Congress chose to insulate them from open-ended and intrusive damage suits based on what are often highly technical matters of judgment. However, in order to avoid tilting the balance unfairly in favor of non-fiduciaries, Congress allowed plan participants to seek "appropriate equitable relief" from non-fiduciaries, subjected non-fiduciaries who are parties-in-interest to the prohibited transaction rules (including punitive taxation and fines), and, in the case of actuaries in particular, provided disciplinary procedures for termination or suspension of their licenses in appropriate circumstances.

The balance struck by Congress should not be judicially upset. As this Court has observed:

[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.

PBGC v. LTV Corp., 496 U.S. at 646-47 (1990) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis added)).

In *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), this Court rejected the Solicitor General's argument that ERISA § 515, 29 U.S.C. § 1145 (1988) – which obligates employers to make

contributions to a multiemployer plan under the terms of a collectively bargained agreement – should be construed broadly to include post-contract delinquencies because of ERISA's policy of benefitting participants.

Our principal reason for rejecting these arguments is our conviction that *Congress' intent is so plain that policy arguments of this kind must be addressed to the body that has the authority to amend the legislation, rather than one whose authority is limited to interpreting it.*

484 U.S. at 551 (emphasis added). Here, as in *Advanced Lightweight Concrete*, there is no legitimate basis to alter the "policy" choices already made by Congress.

The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. *Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.*

Texas Indus., 451 U.S. at 647 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980) (emphasis added)).¹⁸

¹⁸ Petitioners previously argued that a private right of action against non-fiduciaries which permits the recovery of money damages should be implied under *Cort v. Ash*, 422 U.S. 66 (1975). (Cert. Pet. at 9-10.) They have now apparently abandoned that position, since *Cort* is not even cited in their Brief. They did so for good reason. "In this case, the essential predicate for implication of a private remedy plainly does not exist." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). "[T]he context, language, and legislative history . . . all point sharply away from the remedy petitioner urges [the Court] to infer." *Id.* at 180. Where "neither the statute nor the legislative history reveals a congressional intent to create a private right of action . . . we need not carry the *Cort v. Ash* inquiry further." *Russell*, 473 U.S. at 148 (1985) (quoting *Northwest Airlines, Inc.*, 451 U.S. at 94 n.31).

D. REJECTION OF THE "NIETO" AMENDMENT FURTHER DEMONSTRATES CONGRESS' INTENT.

Congress' intention not to permit participants to seek money damages from a non-fiduciary is confirmed by its recent rejection of a proposed amendment that would have explicitly created such a cause of action under ERISA. That amendment, which would have been part of the Omnibus Budget Reconciliation Act of 1989 ("OBRA"), would have added a new § "(c)" to ERISA § 409, providing that:

Any person who participates knowingly in, or knowingly undertakes to conceal, an act or omission of a fiduciary with respect to a plan, knowing such act or omission is a breach of fiduciary responsibility to such plan, shall be personally liable to the plan for such breach of fiduciary responsibility in the same manner and to the same extent as if such person were a fiduciary committing such breach.

H.R. 3299, 101st Cong., 1st Sess. § 3151(e)(6), 135 Cong. Rec. H6006 (daily ed. Sept. 27, 1989).¹⁹

OBRA's legislative history demonstrates that the proposed amendment was drafted specifically to overrule *Nieto*, the decision upon which the Ninth Circuit based its ruling in this case. (See J.A. 45.) H.R. No. 247, 101st Cong., 1st Sess., reprinted in 1989 U.S.C.A.N. 1906, 1969-70. Yet, the proposed amendment was deleted from the bill Congress ultimately enacted, thereby evidencing Congressional intent to preserve ERISA's ban on private damages actions against non-fiduciaries. See *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 837 (1988) ("Once Congress was sufficiently aware

¹⁹ If this amendment had passed, plan participants could have maintained a civil action against a knowing participant for money damages under ERISA § 502(a)(2). Since it was not enacted, Petitioners appear now to recognize that such an action cannot be maintained under ERISA § 502(a)(2). That provision only permits plan participants to sue for appropriate relief under ERISA § 409. By its express terms, § 409 only applies to "any person who is a fiduciary. . . ." (Emphasis added.) The Solicitor General concedes that § 502(a)(2) is not relevant. (SG Br. at 9.)

of [an issue] – as evidenced by its adoption of [a limited provision on that issue] – Congress’ decision to remain silent concerning [the issue] ‘acknowledged and accepted the practice, rather than prohibiting it.’ ”) (quoting *Alessi*, 451 U.S. at 516). At the very least, Congress’ rejection of the “*Nieto*” amendment demonstrates that Petitioners have not met their “exceptionally heavy” burden of demonstrating a “clearly expressed” legislative intention to create such a cause of action.²⁰

Citing *PBGC v. LTV Corp.*, 496 U.S. at 650, Petitioners assert that Congress’ failure to enact the proposed “*Nieto*” amendment “lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’ ” (Pets’ Br. at 17.) Petitioners’ reliance on *LTV* is misplaced.

This is not a case where Congress merely failed to act. By enacting § 502(l) (which authorized only the Secretary of Labor to assess civil penalties for any breach of fiduciary duty or knowing participation in such a breach), Congress did, in fact, act – although not in the manner Petitioners’ wish. That Congress chose to enact § 502(l), and, in the same session, declined to enact the “*Nieto*” amendment, is persuasive evidence that Congress’ decision not to permit plan participants to maintain damages actions against non-fiduciaries was deliberate.

Moreover, in *LTV*, this Court declined to rely on Congress’ failure to amend ERISA to authorize the PBGC to

²⁰ See also *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (Congress’ failure to enact proposed amendment “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.”); *Tanner v. United States*, 483 U.S. 107, 125 (1987) (finding it significant that Congress had considered and rejected proposed rule of evidence); *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 519, 544 n.44 (1979) (finding it significant that Congress considered and rejected proposed amendments to the Labor Management Relations Act).

prohibit so-called “follow-on” plans, in part, because of Congress’ “awareness” that the PBGC was already consistently doing so. 496 U.S. at 650. Thus, no practical purpose would have been served by Congressional action. In stark contrast to this case, the PBGC’s existing interpretation of its authority in *LTV* was clear and consistent; no circuit conflict existed subjecting similarly situated persons to different standards of conduct.²¹

II. PETITIONERS’ ATTEMPT TO REWRITE ERISA IS WITHOUT LEGAL FOUNDATION.

A. ERISA § 502(a)(3) LIMITS PLAN PARTICIPANTS TO OBTAINING EQUITABLE RELIEF FROM NON-FIDUCIARIES.

Petitioners and the Solicitor General claim that common law equity courts traditionally allowed for “make whole” relief, including, if necessary, money damages against a knowing participant in a fiduciary breach. (Pets’ Br. at 24 n.5; SG Br. at 10-18.) Since monetary relief was once available in courts of equity, Petitioners reason that a federal court may award such relief against non-fiduciaries under § 502(a)(3)’s “appropriate equitable relief” provision. Their argument, however, is premised on the mistaken notion that the historical scope of equitable *jurisdiction* defines the permissible scope of modern day equitable *relief* available under § 502(a)(3).

²¹ See also *Johnson v. Transp. Agency*, 480 U.S. 616, 629 n.7 (1987) (finding it significant that Congress had not chosen to overrule Supreme Court’s prior judicial interpretations of congressional statute); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (“Although we are chary of attributing significance to Congress’ failure to act, a refusal by Congress to overrule an agency’s construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress’ attention through legislation specifically designed to supplant it.”).

Damages were available "in courts of equity because those courts had *exclusive jurisdiction* over actions involving a trustee's breach of his fiduciary duties." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1348 n.8 (1990) (emphasis added). Not surprisingly in light of its exclusive jurisdiction, an equity court was free to "go on to a complete adjudication, and . . . establish purely legal rights and grant *legal remedies* which would otherwise be beyond the scope of its authority." 1 John N. Pomeroy, *Equity Jurisprudence* § 181, at 257 (5th ed. 1941) (emphasis added). Equity courts awarded the legal remedy of damages as an ancillary measure in order to resolve the case in a single forum. There was no suggestion thereby that damages somehow became a form of "equitable relief." Thus, contrary to Petitioners' suggestion, it does not follow that when Congress granted plan participants the right to obtain "appropriate equitable relief" from non-fiduciaries, it meant for such relief to include money damages – a form of relief which is patently non-equitable under today's jurisprudence. To hold otherwise would fly in the face of ERISA's plain language, structure and legislative history.

This fundamental flaw in Petitioners' argument was recognized by this Court recently in analogous circumstances. *Terry*, 110 S. Ct. 1339 (1990). In *Terry*, the issue was whether the employees seeking back pay for the union's breach of its duty of fair representation had a right to a jury trial. The union argued that the employees were not entitled to a jury trial because the recovery sought was equitable, since it was "closely analogous to damages awarded to beneficiaries for a trustee's breach of trust." *Id.* at 1348 n.8. In response, however, this Court noted that "[s]uch damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee's breach of his fiduciary duties." *Id.* (citations omitted). Thus, this Court held:

The Union's argument . . . conflates the two parts of our Seventh Amendment inquiry. . . . [I]f the action at issue were analogous to an 18th-century action within the exclusive jurisdiction of the

courts of equity, we would necessarily conclude that the remedy sought was also equitable because it would have been unavailable in a court of law. This view would, in effect, make the first part of our inquiry dispositive. We have clearly held, however, that the second part of the inquiry – *the nature of the relief* – is more important to the Seventh Amendment determination.

Id. (emphasis added). Since the employees sought money damages, not equitable relief, this Court concluded that they were entitled to a jury trial. *Id.* at 1349.

Just as in *Terry*, Petitioners here seek "legal" relief. The Solicitor General concedes that the "make-whole monetary damages" sought by Petitioners "resemble compensatory damages awarded in courts of law. . . ." (SG Br. at 6.) It is well-settled that "[c]ompensatory damages are a classic form of *legal*, not equitable relief." *Harsch v. Eisenberg*, 956 F.2d 651, 656 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992) (emphasis in original). While equity courts awarded such damages because of their exclusive jurisdiction over trust cases at common law, it would defy the reasoning of *Terry*, and would be inconsistent with the "ordinary meaning" of the terms chosen by Congress, to hold that plan participants can recover money damages under § 502(a)(3) when the statute's plain words limit them to obtaining only "appropriate equitable relief."

Petitioners' and the Solicitor General's interpretation ignores the distinction between "equitable relief" and "equitable jurisdiction." Under their interpretation, the word "equitable" as used in § 502(a)(3) would be made to mean the opposite of what a reasonable person thinks it means. It is, therefore, not surprising that none of the myriad of common law trust cases cited by Petitioners or the Solicitor General awarded money damages in the face of a Congressional statute expressly limiting redress to "appropriate equitable relief." (Pets' Br. at 27-28; SG Br. at 13-16.)

This Court has characterized damages as equitable relief in only two situations: where they are "restitutionary," *Terry*, 110 S. Ct. at 1348, and where they are "incidental to or

intertwined with injunctive relief.' " *Id.* (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)). Here, of course, Petitioners seek neither restitution nor an injunction. Instead, they are merely trying to recover money damages as recompense for injuries allegedly sustained as a result of Hewitt's purported improper conduct; archetypal "legal" – not "equitable" – relief.

That Congress intended the term "appropriate equitable relief" as used in § 502(a)(3) to retain its plain meaning is once again confirmed by the legislative history.²² In its report on ERISA, the Senate Finance Committee pointed out that:

Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary [of Labor] or participants or beneficiaries

S. Rep. No. 383, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4890, 4989. Based in part on this passage, the vast majority of courts have held that "appropriate equitable relief" under § 502(a)(3) does not include extra-contractual damages. See, e.g., *Sokol v. Bernstein*, 803 F.2d 532, 538 (9th Cir. 1986) ("[I]t appears that Congress used the word 'equitable' to mean what it usually means – injunctive or declaratory relief.")²³ The rationale of these decisions extends to claims for "contractual" compensatory damages.

²² The placement of the phrase "other appropriate equitable relief" leads inevitably to the same conclusion. The phrase appears immediately after the provision granting plan participants the right to seek an injunction to prevent further violations of the Act, reflecting that the "other" appropriate equitable relief intended by Congress was akin to the just-mentioned injunctive remedy.

²³ See also *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.), cert. denied, 488 U.S. 909 (1988); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), cert. denied, 476 U.S.

In *Novak v. Andersen Corp.*, 962 F.2d 757 (8th Cir. 1992), petition for cert. filed, 61 U.S.L.W. 3156 (U.S. Aug. 26, 1992) (No. 92-352), the Eighth Circuit directly held that a claim for "contractual" compensatory damages could not be pursued under § 502(a)(3).

[Plaintiff] claims he is not seeking legal relief at all, but equitable relief under § 502(a)(3)(B), and that the only "appropriate equitable relief" is monetary damages. *We do not disagree with [Plaintiff's] assertion that monetary damages may indeed be the only appropriate relief in this case. We do disagree, however, with his proposition that an award of monetary damages is equitable relief under ERISA.*

962 F.2d at 759 (emphasis added). As the Eighth Circuit recognized, the sole issue is whether the relief requested by a party invoking § 502(a)(3) is contemplated by the phrase "other appropriate equitable relief." That term is simply not broad enough to encompass the award of money damages. *Id.* at 760. See also *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1553 (11th Cir. 1992) ("We must reject [the] argument that the phrase 'equitable relief' in § [502](a)(3) authorizes an award of compensatory damages. The omission of any mention of a right to legal remedies in § [502](a)(3) must be taken as an indication of Congress' intent to limit the relief available under this section to that which is equitable in nature.") (footnote omitted), petition for cert. filed, 61 U.S.L.W. 3371 (U.S. Oct. 28, 1992) (No. 92-755).

Further guidance on the meaning of "appropriate equitable relief" is provided by the interpretation of similar language in other statutes. See generally *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1141-43 (1991) (interpreting fee-shifting provision of the Civil Rights Act of 1964, 42 U.S.C. § 1988, by examining similarly phrased fee-shifting provisions in other federal statutes). The precise phrase

1170 (1986); *Harsch*, 956 F.2d at 660; *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987).

"other appropriate equitable relief" appears only once elsewhere in the United States Code. See 43 U.S.C. § 618h (1988). There has been no occasion for a court to interpret the language as used in that statute. However, prior to enactment of the Civil Rights Act of 1991, the relief provisions of Title VII, 42 U.S.C. § 2000e-5(g) (1988), used substantively identical language providing that a federal court could enjoin unlawful employment practices "and order such affirmative action as may be appropriate, which may include, . . . any other equitable relief as the court deems appropriate." *Id.* (emphasis added).

Federal courts interpreting the phrase "other equitable relief as the court deems appropriate" uniformly have held that money damages are *not* available under Title VII.²⁴ In fact, this Court recently held that "Title VII does not allow awards for compensatory or punitive damages." *United States v. Burke*, 112 S. Ct. 1867, 1873 (1992).

The unavailability of money damages under Title VII (as distinct from equitable remedies) was well-established prior to ERISA's enactment. See *Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("Whatever may be the merit of the 'equitable' characterization in Title VII cases, there is surely no basis for characterizing [an] award of compensatory and punitive damages . . . as equitable relief.") (emphasis added). See also *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). This prior judicial interpretation of "appropriate" equitable relief must be considered in ascertaining what Congress intended when it included a substantially identical phrase in § 502(a)(3). See generally *Casey*, 111 S. Ct. at 1143-46. See also *Nationwide Mut. Ins. Co. v. Darden*, 112 S. Ct. 1344, 1348 (1992) ("[w]here Congress uses terms that have accumulated settled meaning under . . .

²⁴ See, e.g., *Trautvetter v. Quick*, 916 F.2d 1140, 1147 (7th Cir. 1990); *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 138 (3d Cir.), cert. denied, 479 U.S. 972 (1986); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 197 (6th Cir. 1978), cert. denied, 441 U.S. 932 (1979); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 581 (2d Cir. 1989).

the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."') (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)). Cf. *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) ("The word 'legal' is a term of art. . . . We can infer, therefore, that by providing specifically for 'legal' relief, Congress knew the significance of the term 'legal'. . . .").²⁵

If plan participants are allowed to maintain civil actions seeking money damages from non-fiduciaries, ERISA's carefully crafted structure will be overridden and much of ERISA's enforcement scheme rendered surplusage. If the full range of equitable *and* legal causes of action is available to plan participants under the rubric of "appropriate equitable relief," then why did Congress so carefully delineate the circumstances under which a service provider could become a fiduciary through the functional test adopted in ERISA § 3(21)(A)? If the damages actions available to plan participants who bring breach of fiduciary duty claims under § 502(a)(2) and § 409(a) are also available against non-fiduciaries in an action for "appropriate equitable relief" under § 502(a)(3), how does this Court avoid concluding that §§ 502(a)(2) and 409(a) are unnecessary surplusage? See *Nieto*, 845 F.2d at 873 ("Permitting recovery of damages under section 502(a)(3) would render section 409(a) superfluous, a result contrary to a fundamental canon of statutory construction.").

²⁵ In *Burke*, 112 S. Ct. at 1874 n.12, this Court observed that Congress' decision to permit compensatory and punitive damages under the 1991 Civil Rights Act "signal[ed] a marked change in its conception of the injury redressable by Title VII." Significantly, the Court quoted the Report of the House Committee on Education and Labor which had observed, in connection with the 1991 amendment of Title VII's remedial provisions, that: "'Monetary damages also are necessary to make discrimination victims whole" *Id.* (quoting H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 64-65, reprinted in 1991 U.S.C.C.A.N. 549, 602-03) (emphasis added). Thus, Congress clearly understands that there is a meaningful difference between the terms "equitable relief" and "monetary damages."

The Solicitor and the other Amicus Curiae supporting Petitioners argue that the remedies authorized by § 409 places a "floor" under the type of relief available pursuant to ERISA and that § 502(a)(3) "complete[s] the scheme, by broadly authorizing courts to develop other remedies as appropriate." (SG Br. at 24-25; *see also* Brief Amicus Curiae of American Association of Retired Persons in Support of Petitioners at 9-10.) This position represents a dangerous, expansive and unprincipled interpretation of ERISA. Moreover, if § 409(a) represents a "floor" below which no ERISA remedy against a fiduciary may fall, § 502(a)(3)'s "equitable relief" limitation is a "ceiling" above which no ERISA remedy against a non-fiduciary may rise. By seeking money damages under § 502(a)(3), Petitioners are impermissibly trying to crack that ceiling.

B. THE COMMON LAW OF TRUSTS HAS LIMITED APPLICABILITY AND CANNOT BE USED TO OVERRIDE EXPRESS STATUTORY TERMS.

This Court has observed that "ERISA abounds with the language and terminology of trust law," *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), and has indicated that it will be "guided by principles of trust law" in determining the appropriate standard of review for the denial of a claim for benefits. *Id.* at 111. However, it is *not* true, as Petitioners contend, that, in recognizing its debt to trust law, "Congress intended ERISA to federalize the common law of trusts." (Cert. Pet. at 10; *see also* Pets' Br. at 29-30.) Congress drew upon the common law of trusts selectively, bearing in mind the differences between ERISA's regulatory scheme and the private non-statutory law of gratuitous transfers.

ERISA's "fiduciary responsibility section, in essence, codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865 (emphasis added). Recognition of these principles, however, "does not support the broader proposition that ERISA meant to adopt the entire body of state

trust law lock, stock and barrel." *Nieto*, 845 F.2d at 872 n.2. In fact, Congress noted that "[t]he principles of fiduciary conduct are adopted from existing trust law, but with modifications appropriate for employee benefit plans." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4651 (emphasis added).

Indeed, "application of traditional trust law principles may, in some instances, conflict with Congress' desire to eliminate barriers to the protection and enforcement of rights in ERISA-covered benefit plans." *Thornton v. Evans*, 692 F.2d 1064, 1079 (7th Cir. 1982). Congress was well aware of the inadequacies of existing trust law and thus chose *not* to incorporate inapposite features of that law into ERISA. *See* S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4838, 4865.²⁶

While Congress was influenced by existing trust law principles when it wrote ERISA, it modified certain of those principles (especially the fiduciary duty standards) to fit pension plans. Congress never intended the courts to employ

²⁶ Courts which have opined that ERISA federalized the common law of trusts have done so based on the following statement by one of the Act's sponsors, Senator Williams:

The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 Cong. Rec. 15737 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5177, 5186 (statement of Sen. Williams). Indeed, the first case to "federalize the common law of trusts," *Freund v. Marshall & Ilsley Bank*, 485 F. Supp. 629, 635 (W.D. Wis. 1979), relied almost exclusively on this statement as the basis for its decision.

But even Senator Williams' statement shows that wholesale incorporation of trust law was not intended. Senator Williams' concern with prohibiting exculpatory clauses is instructive. ERISA unambiguously prohibits exculpatory clauses. *See* ERISA § 410(a), 29 U.S.C. § 1110(a) (1988). In stark contrast, at common law, exculpatory provisions in trust instruments were permitted and quite common. *See, e.g., In re E.F. Hutton Southwest Properties II, Ltd.*, 953 F.2d 963, 973 (5th Cir. 1992).

traditional trust law to create causes of action not found within ERISA's explicit terms. ERISA "embod[ies] a tailored law of trusts – a legal fabric which not only adopts familiar trust principles, but also supplements these principles with more exacting standards, and exempts from its reach certain parties and activities that may have been amenable to suit under traditional trust law." *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991) (emphasis in original). The legislative history's general references to trust law "provide[] no support for the incorporation of state law causes of actions as a supplement to the explicit provisions of ERISA." *Nieto*, 845 F.2d at 872.

The limited applicability of trust law to ERISA is illustrated by *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), where this Court relied, in part, on common law trust principles in delineating "the general scope" of an ERISA trustee's "authority and responsibility." *Central States* did not use trust law in the manner proposed by Petitioners, i.e., to fashion an entirely new cause of action not set forth in the language of the Act. Instead, the Court applied those principles to "flesh out" the full meaning of specific rights and responsibilities enacted into law by Congress. Moreover, the Court noted that the structure of the Act itself supported its decision, *id.* at 571, and that there was no inconsistency between the Act and the trust law principles invoked by the Court. *Id.* at 568.

In contrast, to allow Petitioners to use the common law in the manner they propose would eviscerate the integrated and interrelated remedies carefully crafted by Congress "after 'almost a decade of studying the Nation's private pension plans' and other employee benefit plans." *Id.* at 569 (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)). See generally Comment, *Nieto v. Ecker*: The Propriety of Non-

Fiduciary Liability Under Section 409, 64 Notre Dame L. Rev. 271 (1989).²⁷

C. FEDERAL COMMON LAW CANNOT BE USED TO CREATE CAUSES OF ACTION IN AN AREA WHERE CONGRESS HAS ALREADY SPOKEN.

Nor is Petitioners' argument strengthened by reference to the federal common law. (Pets' Br. at 19, 29-30.) "When Congress has not spoken to a particular issue, . . . the Court has found it necessary, in a 'few and restricted' instances, to develop federal common law." *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) (citation omitted). Federal common law, however, "is resorted to '[i]n absence of an applicable Act of Congress,' and because the Court is compelled to consider federal questions 'which cannot be answered from federal statutes alone.'" *Id.* at 314 (citations omitted).

This Court's precedents "do not suggest that, in the past, [it has] invoked some broad-ranging common-law source for

²⁷ The proposition that Congress meant to federalize the common law of trusts begs the question of what exactly constitutes the *common* law of trusts. See 5A Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 553, at 110 (4th ed. 1989) ("It is true that the law of trusts in all the states . . . is based upon the system originally developed by the English Court of Chancery. But not infrequently, . . . different rules have been developed in the various states as to certain problems, sometimes by judicial decision and more often by statute.").

In fact, significant differences appear to have existed at common law regarding the liability of a third party to a trust or its beneficiaries for participating in a breach of trust. As Professor Scott notes: "[I]n some states [the third party] is chargeable with notice of the breach of trust under circumstances in which he has not actual knowledge but has failed to make an inquiry that would have resulted in knowledge, whereas in other states he is not under these circumstances chargeable with notice." *Id.* § 623, at 391. Petitioners do not begin to suggest how this Court should resolve the differences in state trust law, because their analysis of the law of trusts extends no further than observing that, as a general proposition, courts of equity recognized a claim for knowing participation in a breach of fiduciary duty. (Pets' Br. at 20, 26-28.)

creating a cause of action." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645-46 (1981) (emphasis added). Yet, were the Court to adopt Petitioners' view, it would, in fact, be invoking a "broad ranging common-law source" to create a cause of action Congress has expressly declined to enact. Moreover, the Court would be creating this cause of action in an area – the liability of ERISA non-fiduciary service providers – where the Congress has already spoken extensively. "The establishment of . . . a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." *Milwaukee*, 451 U.S. at 319.²⁸

It is instructive that in the more than fifty times this Court has been called upon to interpret ERISA, it has only once invoked federal common law as the actual rule of decision. In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Court relied on the federal common law in holding that courts must apply a *de novo* standard in reviewing the denial of a participant's benefit claim. Significantly, however, in stark contrast to the question presented here, ERISA is completely silent on the appropriate standard of review. This Court thus resorted to the federal common law in *Firestone* only because the issue raised had *not* been addressed by Congress. Here, the issue of non-fiduciary liability has been expressly addressed; Congress determined that plan participants can only obtain "appropriate equitable relief" from non-fiduciaries under ERISA.

²⁸ See also *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986) ("The claim that Congress intended for the federal courts to create a body of federal common law to govern ERISA cases does *not*, as appellant suggests, give a federal court *carte blanche* authority to apply any prevailing state common law doctrine it chooses to ERISA cases.") (emphasis added); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 541 (7th Cir. 1991) (recognizing "distinction between the power of federal courts to create a substantive federal common law of contracts and trusts under ERISA and our far more circumscribed power to augment ERISA's remedial provisions.") (emphasis added).

Nevertheless, relying on *Firestone*, both Petitioners and the Solicitor General argue that they should prevail because the failure to recognize a money damages cause of action against non-fiduciaries would afford less protection to ERISA beneficiaries than they enjoyed before ERISA was enacted. (Pets' Br. at 26; SG Br. at 10, 16-17.) That assertion is incorrect. ERISA's complete system of protection for plan participants represents a vast enhancement of the protections formerly available to participants, including damages actions and equitable relief against fiduciaries and equitable and regulatory relief against non-fiduciaries. (See *supra* at 15-18.)

The fact that Congress purposely chose not to provide for a civil action seeking money damages from a non-fiduciary does not suggest that, under the reasoning of *Firestone* or otherwise, this Court may engraft that remedy onto the statute. See *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453 (4th Cir. 1992) (Wilkinson, J., concurring) ("The device of federal common law does not authorize federal courts to smuggle state common law principles into ERISA without regard for the statutory text."); *Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2968 (1992) ("to devise a federal common law remedy for [plaintiff's] claim would defeat the scheme created by Congress in ERISA.").²⁹

D. ERISA § 502(I) PROVIDES NO SUPPORT FOR PETITIONERS' CONTENTIONS.

Petitioners argue that Congress' decision to provide the Secretary of Labor with the power to fine non-fiduciaries for participating in a fiduciary breach confirms that Congress had already given participants the right to maintain an action against non-fiduciaries for money damages. (Pets' Br. at 15.)

²⁹ Cf. *NLRB v. Hearst Publications*, 322 U.S. 111, 125 (1944) ("It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness.").

The difficulty with this argument is that Congress never indicated that it intended this expansive result. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'The short answer is that Congress did not write the statute that way.' ") (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)). Indeed, in rejecting the "*Nieto*" amendment, Congress indicated that it intended for such a cause of action not to exist.

Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp.*, 446 U.S. at 392-93 (Stewart J., dissenting)).³⁰

ERISA § 502(l) allows the Secretary of Labor to impose a fine for any "knowing participation" in a breach of fiduciary duties by "other persons" in an amount equal to twenty percent of the "applicable recovery amount."³¹ Petitioners' argument that there could never be an "applicable recovery amount" from "other persons" against which civil penalties

³⁰ See also *Thompson v. Thompson*, 484 U.S. 174, 185 (1988) (finding it significant that "Congress considered and rejected an approach to the problem" similar to that of party urging implication of a private remedy); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 546 (1984) (noting that Congress "specifically considered" an issue in an early version of a bill but "deleted" it from the version finally passed); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 601 (1983) (failure of Congress to include proposal in statute " 'is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief.' ") (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 22 (1979)).

³¹ "Applicable recovery amount" is defined as "any amount which is recovered from a fiduciary or other person with respect to a breach or violation" of ERISA Part 4, pursuant to a settlement agreement, or "ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5)." ERISA § 502(l)(2), 29 U.S.C. § 1132(l)(2) (Supp. II 1990).

could be measured unless ERISA encompassed the right to recover money damages from non-fiduciaries (Pets' Br. at 15) is premised on a misreading of the statute. In essence, what Petitioners ask this Court to do is to posit the existence of an entire cause of action on behalf of plan participants – indeed, one explicitly rejected by Congress – on the basis of one phrase – "applicable recovery amount" – in a section explicitly dealing with civil penalties available only to the Secretary of Labor.

Moreover, merely because the statute appears to contemplate that there might be occasions where there will be an "applicable recovery amount" from "other persons" against which to measure the Secretary's fine, does *not* mean that ERISA already authorizes participants (or the Secretary of Labor, for that matter) to maintain civil actions seeking the recovery of money damages from non-fiduciaries. There are several instances in which an "applicable recovery amount" from "other persons" violating ERISA would exist independent of a cause of action for money damages against non-fiduciaries.

ERISA § 502(l)(4), 29 U.S.C. § 502(l)(4) (Supp. II 1990), for example, instructs the Secretary to reduce the fine imposed under § 502(l) by the amount of any penalty imposed under ERISA § 502(i). ERISA § 502(i) is the provision allowing the Secretary of Labor to fine a party-in-interest participating in a prohibited transaction as defined in ERISA § 406. ERISA § 502(i) provides that the amount of the fine assessed for a violation of the prohibited transaction rules is to be a percentage of the "amount involved" as defined by § 4975(f)(4) of the Internal Revenue Code. Section 4975(f)(4) defines "amount involved" as "the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received" by the non-fiduciary party-in-interest as a result of the prohibited transaction. I.R.C. § 4975(f)(4).³²

³² Congress plainly understood that there was substantial overlap between the new "knowing participation" penalty and the existing "party in

Thus, under § 502(i), there can be an "amount" by which to measure the Secretary's fine against a non-fiduciary service provider under § 502(l) without a money damages remedy. That "amount" is part of what § 502(l) was designed to address – violations of the prohibited transaction rules.³³

Similarly, under § 502(a)(5) (which empowers the Secretary of Labor to seek "appropriate equitable relief" against persons violating ERISA), there may also be an "applicable recovery amount", even though no cognizable claim for money damages exists. As the Ninth Circuit observed, the phrase "other appropriate equitable relief" (which appears in both § 502(a)(3) and § 502(a)(5)) authorizes the awarding of equitable relief against *non-fiduciaries*, including those forms of equitable relief, like restitution, that involve the transfer of money. (J.A. 44.) The amount of money a non-fiduciary is required to disgorge by a restitution award under § 502(a)(5) would be the "applicable recovery amount."³⁴

The fact that § 502(l) does not provide plan participants, directly or by implication, with the right to maintain a civil

interest" penalty. See David L. Bacon et al., *Employee Benefits Guide* § 7.13[1], at 7-71 (1992) (noting that § 502(l) meant to address, *inter alia*, violations of the prohibited transactions rules). This is further evidenced by the fact that, upon § 502(l)'s amendment, § 502(a)(6), 29 U.S.C. § 1132(a)(6) (Supp. II 1990), was amended to permit the Secretary of Labor to maintain a civil action to collect any civil penalty under § 502(i) and § 502(l).

³³ The Department of Labor's comments on § 502(l)'s proposed regulations reflect that the amount "necessary to achieve correction" of a prohibited transaction will constitute an "applicable recovery amount" for purposes of § 502(l). 55 Fed. Reg. 25,288 (to be codified at 29 C.F.R. pt. 2560) (proposed June 20, 1990).

³⁴ Conversely, the Department of Labor's comments on § 502(l)'s proposed regulations demonstrate that, if "the equitable relief awarded does not involve the transfer to the plan of money or property, no civil penalty may be assessed pursuant to section 502(l)." 55 Fed. Reg. 25,288, 25,289 n.9 (to be codified at 29 C.F.R. pt. 2560) (proposed June 20, 1990) (emphasis added).

action seeking money damages from non-fiduciaries, is also confirmed by the legislative history.

The initial OBRA bill – proposed by the House of Representatives – included an ERISA amendment entitled: "Clarification of liability of knowing participants in breaches of fiduciary duty." H.R. Rep. No. 247, 101st Cong., 1st Sess., reprinted in 1989 U.S.C.C.A.N. 1906, 1969. If enacted, it would have made persons who knowingly participate in a breach of fiduciary duty liable for money damages. However, when that bill was submitted to the Senate, it was *rejected* in its entirety in favor of a proposed Senate bill. See H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess., reprinted in 1989 U.S.C.C.A.N. 3018. In response, the House submitted a third version. *Id.* The House and Senate conferees then agreed on the final language of the bill. The House's "*Nieto*" amendment did not make it into the final bill.

Section 502(l)'s adoption had *nothing to do* with overruling *Nieto* or providing participants with the right to maintain an action seeking money damages from non-fiduciaries. While noting the importance of trust law principles to ERISA, the legislative history demonstrates that § 502(l) served solely as a compromise response to the Senate's attempt, in its version of the bill, to *increase the insurance premiums paid by plans for PBGC insurance*.

The initial proposed Senate bill would have increased PBGC insurance premiums paid by all covered single-employer plans. The House bill contained no such provision. The Conference Committee compromised on § 502(l):

In lieu of the premium increase, the conferees agreed to strengthen the Secretary of Labor's authority to enforce ERISA by providing for a mandatory civil penalty for certain violations.

Id. at 3034 (emphasis added).

Accordingly, instead of supporting the contention that the amendment created or confirmed a plan participant's right to seek money damages from non-fiduciaries, the legislative history reinforces the conclusion that ERISA contains no such provision and highlights Congress' intention not to create such a cause of action.

In short, in relying on § 502(l), Petitioners are engaged in interpretive shadow boxing – arguing that a cause of action exists whose only statutory “basis” is the shadow cast by Congress’ enactment of an entirely different civil penalty provision only enforceable by the Secretary of Labor. In the face of the direct evidence to the contrary, this Court should not create a cause of action based on that ephemeral foundation.³⁵

E. RUSSELL’S PRONOUNCEMENT THAT CAUSES OF ACTION NOT INCORPORATED IN ERISA SHOULD NOT BE IMPLIED IS STILL CONTROLLING.

In *Russell*, 473 U.S. at 148, this Court held, after thoroughly analyzing ERISA’s text, structure and legislative history, that ERISA did not provide a plan participant with “a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims.”

Petitioners erroneously suggest that *Russell* now has been overruled by *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). (Pets’ Br. at 22.) In that case, McClendon claimed that Ingersoll-Rand had fired him in order “to avoid making contributions to his pension fund.” 111 S. Ct. at 481. McClendon sued in Texas state court under various tort and contract theories, seeking compensatory and punitive damages. *Id.* Because the action did not seek “pension benefits”, the state court found that it was not preempted by ERISA. However, this Court held McClendon’s state law claims preempted,

³⁵ See *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412, 421 (1975) (refusing to infer a private right of action to enforce the Securities Investor Protection Act because there was no indication “that Congress ever contemplated a private right of action parallel to that expressly given to the SEC.”); *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 414 U.S. 453, 457 (1974) (refusing to infer private right of action under § 307(a) of the Rail Passenger Service Act of 1970 because the relevant language of that provision was expressly limited to actions brought by the Attorney General).

since they “related to” an employee benefit plan. ERISA § 510, 29 U.S.C. § 1140 (1988), made it unlawful for any person to discharge a participant for exercising any right under the provisions of any employee benefit plan, and made the enforcement provisions of ERISA § 502, 29 U.S.C. § 1132 (1988 & Supp. II 1990), expressly applicable to the enforcement of the rights created by § 510. In reaching that result, this Court stated:

[T]here is no basis in § 502(a)’s language for limiting ERISA actions to only those which seek “pension benefits.” It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a preemption argument that a particular plaintiff is not seeking recovery of pension benefits.

Id. at 486.

The vast majority of courts that have been faced with the issue have rejected Petitioners’ argument that *Russell*’s admonition against implying causes of action Congress chose not to incorporate in ERISA has somehow been overruled by this passage. See, e.g., *McRae v. Seafarers’ Welfare Plan*, 920 F.2d 819, 821 n.7 (11th Cir. 1991) (“The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits. . . . The Supreme Court is not holding that the specific remedies . . . sought under state law are necessarily the remedies that will be afforded him . . . under ERISA § 502.”) (emphasis in original).³⁶

³⁶ Accord *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), cert. denied, 113 S. Ct. 61 (1992). See also *Roberts v. Thorn Apple Valley, Inc.*, 784 F. Supp. 1538, 1541 (D. Utah 1992) (“The Court agrees with the observation made by several other courts, that the Supreme Court would not overrule a considerable body of federal caselaw barring punitive and extra contractual damages under ERISA without a specific expression of such intent.”); *Gaskell v. Harvard Coop. Soc’y*, 762 F. Supp. 1539, 1544 (D. Mass. 1991) (“[H]ad the Supreme Court intended to expand the realm of potential relief available under ERISA, . . . it would have done so explicitly. Such a departure from precedent likely would not have been

In any event, the relief available to a plan participant under § 502(a) for enforcing rights expressly created by a specific ERISA provision, is a much different question from whether this Court can incorporate a specific cause of action against non-fiduciaries that Congress expressly declined to enact. *Russell's* prohibition against judicial tampering with ERISA's enforcement scheme remains controlling.

F. PETITIONERS ARE NOT ENTITLED TO "APPROPRIATE EQUITABLE RELIEF" UNDER ERISA § 502(a)(3).

Whatever claim for "appropriate equitable relief" Petitioners might once have had under § 502(a)(3) has been abandoned. Although Petitioners' Complaint merely sought an order that Hewitt "make good to the Plan, plaintiffs and their class any and all losses to the Plan resulting from [Hewitt's] breaches of ERISA," together with a claim for punitive damages (J.A. 15), the District Court, at Petitioners' request, agreed to construe the Complaint as including a prayer for restitutionary relief. (J.A. 26.) Having done so, however, the District Court then found that Petitioners had failed to state a claim for equitable restitution as a matter of law. (J.A. 26-28.)

The Ninth Circuit agreed, holding that Petitioners had not stated a viable equitable restitution claim because they had not alleged that Hewitt received anything other than its compensation for actuarial services. (J.A. 44.) Thus, "[r]estitution was not available because unjust enrichment to support plaintiffs' claim was not alleged." (*Id.*) The Ninth Circuit also found that it was "not possible . . . to frame a claim for

accomplished in a single sentence, in dicta, at the close of an opinion focused exclusively on a wholly different issue."); *Monfletto v. John Hancock Healthplans, Inc.*, Civ. No. 90-5137, 1991 WL 231608, at *2, 1991 U.S. Dist. LEXIS 15875 at *5-6 (E.D. Pa. Oct. 30, 1991); *O'Neil v. GenCorp, Inc.*, 764 F. Supp. 833, 834 (S.D.N.Y. 1991) ("Had Justice O'Connor intended . . . that [her] analysis of § 510 was overruling the considerable amount of federal caselaw barring punitive and extra-contractual damages under ERISA . . . she would undoubtedly have so stated.")

restitution . . . of plan assets wrongfully obtained by Hewitt" because Hewitt was paid by Kaiser, not out of assets of the Plan. (J.A. 45.) Finally, the Ninth Circuit rejected Petitioners' claim that all payments received by Hewitt from Kaiser were unjust enrichment in "remuneration for breach of Hewitt's statutory duty" because such a finding would gut the already "blurry distinction" between restitution and damages at law. (*Id.*)

Petitioners have not sought review of that portion of the Ninth Circuit's ruling. Accordingly, review is barred by Supreme Court Rule 14.1(a). *See, e.g., Regents of Univ. of California v. Bakke*, 438 U.S. 265, 280 & n.13 (1978) (where petitioner had not challenged lower court's decision regarding shifting of burden of proof, Court declined to address the issue, stating "[t]he issue of the proper placement of the burden of proof . . . is not before us."); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984) ("we are chary of considering issues not presented in petitions for certiorari.").

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1988), provides:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

ERISA § 409(a), 29 U.S.C. § 1109(a) (1988), provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

ERISA § 502(a), 29 U.S.C. § 1132(a) (1988 & Supp. II 1990), provides in relevant part:

A civil action may be brought –

• • •

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

ERISA § 502(l), 29 U.S.C. § 1132(l) (Supp. II 1990), provides:

(1) In the case of – (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or (B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term “applicable recovery amount” means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) – (A) pursuant to any settlement agreement with the Secretary, or (B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding

instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary’s sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that – (A) the fiduciary or other person acted reasonably and in good faith, or (B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

ERISA § 3042, 29 U.S.C. § 1242 (1988), provides:

Enrollment by Board; Standards and qualifications; suspension or termination of enrollment

(a) The Joint Board shall, by regulations, establish reasonable standards and qualifications for persons performing actuarial services with respect to plans in which this chapter applies and, upon application by any individual, shall enroll such individual if the Joint Board finds that such individual satisfies such standards and qualifications. With respect to individuals applying for enrollment before January 1, 1976, such standards and qualifications shall include a requirement for an appropriate period of responsible actuarial experience relating to pension plans. With respect to individuals applying for enrollment on or after January 1,

1976, such standards and qualifications shall include -

(1) education and training in actuarial mathematics and methodology, as evidenced by -

(A) a degree in actuarial mathematics or its equivalent from an accredited college or university,

(B) successful completion of an examination in actuarial mathematics and methodology to be given by the Joint Board, or

(C) successful completion of other actuarial examinations deemed adequate by the Joint Board, and

(2) an appropriate period of responsible actuarial experience.

* * *

(b) The Joint Board may, after notice and an opportunity for a hearing, suspend or terminate the enrollment of an individual under this section if the Joint Board finds that such individual -

(1) has failed to discharge his duties under this chapter, or

(2) does not satisfy the requirements for enrollment as in effect at the time of his enrollment.

The Joint Board may also, after notice and opportunity for hearing, suspend or terminate the temporary enrollment of an individual who fails to discharge his duties under this Act or who does not satisfy the interim enrollment standards.

20 C.F.R. § 901.20 (1992) provides:

STANDARDS OF PERFORMANCE OF ACTUARIAL SERVICES

In the discharge of duties required by ERISA of enrolled actuaries with respect to any plan to which the Act applies:

(a) *In general.* An enrolled actuary shall undertake an actuarial assignment only when qualified to do so.

(b) *Professional duty.* An enrolled actuary shall not perform actuarial services for any person or organization which he/she believes or has reasonable grounds for believing may utilize his/her services in a fraudulent manner or in a manner inconsistent with law.

(c) *Advice or explanations.* An enrolled actuary shall provide to the plan administrator upon appropriate request, supplemental advice or explanation relative to any report signed or certified by such enrolled actuary.

(d) *Conflicts of interest.* In any situation in which the enrolled actuary has a conflict of interest with respect to the performance of actuarial services, of which the enrolled actuary has knowledge, he/she shall not perform such actuarial services except after full disclosure has been made to the plan trustees, any named fiduciary of the plan, the plan administrator, and, if the plan is subject to a collective bargaining agreement, the collective bargaining representative.

(e) *Assumptions, calculations and recommendations.* The enrolled actuary shall exercise

due care, skill, prudence and diligence to ensure that:

(1) The actuarial assumptions are reasonable in the aggregate, and the actuarial cost method and the actuarial method of valuation of assets are appropriate,

(2) The calculations are accurately carried out, and

(3) The report, any recommendations to the plan administrator and any supplemental advice or explanation relative to the report reflect the results of the calculations.

(f) *Report or certificate.* An enrolled actuary shall include in any report or certificate stating actuarial costs or liabilities, a statement or reference describing or clearly identifying the data, any material inadequacies therein and the implications thereof, and the actuarial methods and assumptions employed.

(g) *Utilization of enrolled actuary designation.* An enrolled actuary shall not advertise his/her status as an enrolled actuary in any solicitation related to the performance of actuarial services, and shall not employ, accept employment in partnership, corporate, or any other form, or share fees with, any individual or entity who so solicits. However, the use of the term "enrolled actuary" to identify an individual who is named on the stationery, letterhead or business card of an enrolled actuary, or of a partnership, association, or corporation shall not be considered in violation of this section. In addition, the term "enrolled actuary" may appear after the general listing of an enrolled

actuary's name in a telephone directory provided such listing is not of a distinctive nature.

(h) *Notification.* An enrolled actuary shall provide written notification of the non-filing of any actuarial document he/she has signed upon discovery of the non-filing. Such notification shall be made to the office of the Internal Revenue Service, the Department of Labor, or the Pension Benefit Guaranty Corporation where such document should have been filed.

20 C.F.R. § 901.31 (1992) provides:

GROUNDS FOR SUSPENSION OR TERMINATION OF ENROLLMENT

(a) *Failure to satisfy requirements for enrollment.* The enrollment of an actuary may be terminated if it is found that the actuary did not satisfy the eligibility requirements set forth in §§ 901.12 or 901.13, whichever is applicable.

(b) *Failure to discharge duties.* The enrollment of an actuary may be suspended or terminated if it is found that the actuary, following enrollment, failed to discharge his/her duties under ERISA. Such duties include those set forth in § 901.20.

(c) *Disreputable conduct.* The enrollment of an actuary may be suspended or terminated if it is found that the actuary has, at any time after he/she applied for enrollment, engaged in any conduct set forth in § 901.13(e)(1)(i)-(vi) or other conduct evidencing fraud, dishonesty, or breach of trust. Such other conduct includes, but is not limited to, the following:

(1) Conviction of any criminal offense under the laws of the United States (including Section 411 of ERISA, 29 U.S.C. 1111), any State thereof, the District of Columbia, or any territory or possession of the United States, which evidences fraud, dishonesty, or breach of trust.

(2) Knowingly filing false or altered documents, affidavits, financial statements or other papers on matter relating to employee benefit plans or actuarial services.

(3) Knowingly making false or misleading representations, either orally or in writing, on matters relating to employee benefit plans or actuarial services, or knowingly failing to disclose information relative to such matters.

(4) The use of false or misleading representations with intent to deceive a client or prospective client, or of intimations that the actuary is able to obtain special consideration or action from an officer or employee of any agency or court authorized to determine the validity of pension plans under ERISA.

(5) Willful violation of any of the regulations contained in this part.

INTERNAL REVENUE CODE § 4975(f)(4), 26 U.S.C. § 4975(f)(4) (1988), provides:

Amount involved

The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of

subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value -

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

INTERNAL REVENUE CODE § 6059, 26 U.S.C. § 6059 (1988), provides:

(a) **GENERAL RULE** - The actuarial report described in subsection (b) shall be filed by the plan administrator (as defined in section 414(g)) of each defined benefit plan to which section 412 applies, for the first plan year for which section 412 applies to the plan and for each third plan year thereafter (or more frequently if the Secretary determines that more frequent reports are necessary).

(b) **ACTUARIAL REPORT** - The actuarial report of a plan required by subsection (a) shall be prepared and signed by an enrolled actuary (within the meaning of section 7701(a)(35)) and shall contain -

(1) a description of the funding method and actuarial assumptions used to determine costs under the plan,

(2) a certification of the contribution necessary to reduce the accumulated funding deficiency (as defined in section 412(a)) to zero,

(3) A statement -

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 412(c) (relating to reasonable actuarial assumptions) have been complied with,

(4) such other information as may be necessary to fully and fairly disclose the actuarial position of the plan, and

(5) such other information regarding the plan as the Secretary may by regulations require.

INTERNAL REVENUE CODE § 7701(a), 26 U.S.C.
§ 7701(a) (1988), provides:

(35) Enrolled actuary

The term "enrolled actuary" means a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the title III of the Employee Retirement Income Security Act of 1974.
